PUBLIC VERSION

Before the
Federal Communications Commission
Washington, DC 20554

BELLSOUTH TELECOMMUNICATIONS, LLC d/b/a AT&T NORTH CAROLINA and d/b/a AT&T SOUTH CAROLINA, Complainant, v. DUKE ENERGY PROGRESS, LLC, Defendant.	Proceeding No. 20-293 Bureau ID No. EB-20-MD-004

OPPOSITION OF BELLSOUTH TELECOMMUNICATIONS, LLC d/b/a AT&T NORTH CAROLINA AND d/b/a AT&T SOUTH CAROLINA TO DUKE ENERGY PROGRESS'S PETITION FOR RECONSIDERATION

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* Certain information in this Opposition to Duke Progress's Petition for Reconsideration has been designated confidential pursuant to 47 C.F.R. § 1.731. The designated information is marked with a text box in the confidential version of these pleadings and is redacted in the public version.

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Pursuant to 47 C.F.R. § 1.106(g), BellSouth Telecommunications, LLC d/b/a AT&T North Carolina and d/b/a AT&T South Carolina ("AT&T") respectfully submits this opposition to Duke Energy Progress's ("Duke Progress") petition for reconsideration of the Enforcement Bureau's September 21, 2021 Memorandum Opinion and Order (the "*Bureau Order*").[1]

I. Introduction and Summary

The Commission should promptly dismiss Duke Progress's petition for reconsideration because the *Bureau Order* plainly does not warrant consideration under Commission rule 1.106(p). First, the petition "rel[ies] on arguments that have been fully considered and rejected … within the same proceeding."[2] "[R]epetition of the same arguments … does not provide grounds for reconsideration."[3] Second, the petition fails to "identify any material error, omission, or reason warranting reconsideration" as required.[4] Instead, Duke Progress attempts to relitigate long-settled rate-setting principles and a decade of pole attachment rate reform requiring a reduction of its unjust and unreasonable rates. These are not proper bases for reconsideration.

If the Commission addresses the petition on the merits, it should deny it for reasons already provided in the *Bureau Order* and many other Commission decisions. A decade ago, the Commission required competitively neutral pole attachment rates to reduce infrastructure costs, promote competition, and foster broadband deployment.[5] Yet Duke Progress ignored this

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[1] Memorandum Opinion and Order, Proceeding No. 20-293, Bureau ID No. EB-20-MD-004 (EB Sept. 21, 2021) ("*Bureau Order*").

[2] 47 C.F.R. § 1.106(p)(3).

[3] *See AT&T Corp. v. Wide Voice, LLC*, Memorandum Opinion and Order, ¶ 4, Proceeding No. 20-362 (EB Sept. 28, 2021) ("*Wide Voice Order*").

[4] 47 C.F.R. § 1.106(p)(1).

[5] *See, e.g., In re Accelerating Wireline Broadband Deployment by Removing Barriers to Infrastructure Investment*, Third Report and Order, 33 FCC Rcd 7705, 7767 (¶ 123) (2018)

directive and continued to charge AT&T $[redacted] per pole rates under the parties' Joint Use Agreement ("JUA") while charging AT&T's competitors an approximately $[redacted] new telecom rate,[6] which fully compensates Duke Progress for "all costs that are caused by [an] attacher."[7] This $[redacted] *per pole premium* overcompensates Duke Progress to the tune of $[redacted] million annually to the detriment of the Commission's competition and deployment goals.[8] The *Bureau Order* correctly finds that Duke Progress charged AT&T unjust and unreasonable pole attachment rates and must refund amounts it unlawfully collected.[9] The Commission should promptly reject Duke Progress's petition and provide AT&T the just and reasonable pole attachment rates that the law and the Commission's competition and deployment goals require.

II. Duke Progress's Petition Is Procedurally Barred Because It Repeats Arguments Already Made and Rejected.

Duke Progress's petition "plainly do[es] not warrant consideration" because it "[r]el[ies] on arguments that have been fully considered and rejected by the Commission within th[is] …

("*Third Report and Order*") ("In the interest of promoting infrastructure deployment, the Commission adopted a policy in 2011 that similarly situated attachers should pay similar pole attachment rates for comparable access.").

[6] *Bureau Order* ¶ 6; Answer, Proceeding No. 20-293 (Nov. 13, 2020) ("Answer"), Ex. D at DEP000305 (Harrington Decl. ¶ 10) (listing rates Duke Progress charged CLEC and cable attachers, which average to about $[redacted] per pole).

[7] *See Implementation of Section 224 of the Act; A National Broadband Plan for Our Future*, Report and Order and Order on Reconsideration, 26 FCC Rcd 5240, 5299 (¶ 137), 5321 (¶ 182) (2011) ("*Pole Attachment Order*").

[8] *Implementation of Section 224 of the Act; A National Broadband Plan for Our Future*, 30 FCC Rcd 13731, 13741 (¶ 20) (2015) ("*Cost Allocator Order*") ("[W]e view pole attachment rate reform as part of the Commission's fundamental mission to advance the availability and adoption of broadband in America."); *see also* Complaint, Proceeding No. 20-293 (Sept. 1, 2020) ("Compl."), Ex. A at ATT00008-9 (Rhinehart Aff. ¶ 15).

[9] For reasons detailed in AT&T's Application for Review, the just and reasonable rate for AT&T's use of Duke Progress's poles should be the same new telecom rate guaranteed AT&T's competitors, rather than a higher rate (up to the old telecom rate) set by the *Bureau Order*. *See* Application for Review, Proceeding No. 20-293 (Oct. 21, 2021).

proceeding" and many others.[10] Having considered the arguments Duke Progress repeats here, the *Bureau Order* found (1) the JUA rates are subject to review under the 2011 *Pole Attachment Order* and the 2018 *Third Report and Order*,[11] (2) AT&T's rate—like its competitors' rates—must be based on the 1 foot of space its facilities are presumed to occupy on a pole,[12] (3) Duke Progress relied on "speculative" valuations that were "conclusory," "unsupported by reliable evidence" and "at odds with precedent" in its effort to justify charging AT&T a rate higher than the fully compensatory new telecom rate,[13] (4) Duke Progress must refund amounts it unlawfully collected consistent with the 3-year contract law statute of limitations in North Carolina and South Carolina,[14] and (5) the Commission has jurisdiction over this dispute to ensure just and reasonable rates.[15] Each of these findings reflected a straightforward application of prior

[10] 47 C.F.R. § 1.106(p)(3); *see also, e.g.*, *Wide Voice Order* ¶ 4 ("Wide Voice's repetition of the same arguments here does not provide grounds for reconsideration"); *In the Matter of Updating the Intercarrier Comp. Regime*, 35 FCC Rcd 6223, 6229 (¶ 18) (2020) ("Our rules and precedent are clear that we need not consider petitions for reconsideration … that 'merely repeat arguments we previously ... rejected' in the underlying order.") (citation omitted); *In the Matter of Ely Radio, LLC*, 27 FCC Rcd 7608, 7610 (¶ 6) (2012) ("A petition for reconsideration that reiterates arguments that were previously considered and rejected will be denied."); *Qwest Commc'ns Co. v. N. Valley Commc'ns, LLC*, 26 FCC Rcd 14520, 14522 (¶ 5) (2011) ("It is 'settled Commission policy that petitions for reconsideration are not to be used for the mere reargument of points previously advanced and rejected.'") (citation omitted).

[11] *See Bureau Order* ¶¶ 9-14, 36-40; *see also, e.g.*, Petition at 1-9 (Arguments I-II); Answer ¶¶ 11, 21, 32; Duke Progress's Supplemental Brief at 14-15, Proceeding No. 20-293 (Apr. 8, 2021) ("Duke Progress Supp. Br.").

[12] *See Bureau Order* ¶¶ 49-51; *see also, e.g.*, Petition at 9-10, 21 (Argument III, V); Answer ¶¶ 12, 25, 31; Duke Progress Supp. Br. at 9-10, 21-22; Duke Progress's Reply Supplemental Brief at 12-13, Proceeding No. 20-293 (Apr. 19, 2021) ("Duke Progress Reply Supp. Br.").

[13] *See Bureau Order* ¶¶ 43-46; *see also, e.g.*, Petition at 11-22 (Arguments IV-V); Answer ¶¶ 8, 10, 15; Duke Progress Supp. Br. at 1-14.

[14] *See Bureau Order* ¶¶ 58-63; *see also, e.g.*, Petition at 22-25 (Arguments VI-VII); Answer ¶ 32 and Affirmative Defenses 1, 2, 3, 4, 5, 6, 7.

[15] *See Bureau Order* ¶¶ 1 n.2, 2; *see also, e.g.*, Petition at 25 (Argument VIII); Answer ¶ 35 and Affirmative Defense 13.

Commission decisions.[16] Duke Progress's request that the Commission consider them *again* on reconsideration is a waste of the Commission's (and AT&T's) time and resources.[17]

And Duke Progress never attempts "to identify any material error, omission, or reason warranting reconsideration."[18] Instead, Duke Progress argues that the *Bureau Order* should have *abandoned* precedent to reach a different decision here.[19] That is not and cannot be a "material error" in the "*application of* ... Commission precedent to the facts of this case."[20] Duke

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[16] *See, e.g.*, *Verizon Md. LLC v. The Potomac Edison Co.*, 35 FCC Rcd 13607 (2020) ("*Potomac Edison Order*"); *Third Report and Order*, 33 FCC Rcd at 7705-7771 (¶¶ 123-129); *Pole Attachment Order*, 26 FCC Rcd at 5288-5290 (¶¶ 107-112), 5321-5338 (¶¶ 182-220); *see also BellSouth Telecommunications v. Duke Energy Florida, LLC*, Memorandum Opinion and Order, Proceeding No. 20-276 (EB Aug. 27, 2021) ("*Duke Florida Order*"); *BellSouth Telecommunications v. Fla. Power & Light Co.*, 36 FCC Rcd 253 (EB 2021) ("*FPL 2021 Order*"); *BellSouth Telecommunications v. Fla. Power & Light Co.*, 35 FCC Rcd 5321 (EB 2020) ("*FPL 2020 Order*"); *Verizon Va. v. Va. Elec. and Power Co.*, 32 FCC Rcd 3750 (EB 2017) ("*Dominion Order*").

[17] Duke Progress puts a new spin on 2 prior arguments, but they remain redundant. First, having unsuccessfully argued that AT&T does not "genuinely lack the ability" to negotiate new rates despite AT&T's fruitless 15-month effort to do so, Duke Progress now argues AT&T does not "genuinely lack the ability" to negotiate new rates because the negotiations did not begin sooner. *See* Petition at 6-7; Answer ¶ 27; *Bureau Order* ¶ 39. Second, having unsuccessfully argued that the applicable statute of limitations for refunds should be 2 years under 47 U.S.C. § 415(c), Duke Progress now argues the 2-year period could also be found in 47 U.S.C. § 415(b). *See* Petition at 24-25; Answer ¶ 32; *Bureau Order* ¶ 60. These expanded arguments remain meritless for reasons detailed below.

[18] 47 C.F.R. § 1.106(p)(1); *see also, e.g.*, *In Re Applications of Bennett Gilbert Gaines*, 8 FCC Rcd 3986, 3986 (¶ 3) (1993) ("To be successful, a petition for reconsideration must rely on new facts, changed circumstances, or material errors or omissions in the underlying opinion.").

[19] *See, e.g.*, Petition at 8-9 (challenging the *Bureau Order*'s reliance on precedent that Duke Progress considers wrong); *id.* at 14 (faulting the *Bureau Order* for relying "on its own finding in the *FPL I Decision*"); *id.* at 19-20 (challenging the 2018 *Third Report and Order*'s adoption of the old telecom rate as a "hard cap"); *id.* at 24-25 (seeking reconsideration of the Commission's refund standard, adopted in the 2011 *Pole Attachment Order* and further described in the 2020 *Potomac Edison Order*); *id.* at 25 (challenging the Commission's jurisdiction over the rates charged ILECs, an issue settled in 2011 and affirmed on appeal).

[20] *See In the Matter of Alpha & Omega Commc'ns, LLC*, 30 FCC Rcd 1931, 1932 (¶ 4) (2015) (emphasis added).

Progress's petition is thus procedurally flawed and should be dismissed or denied for these reasons alone.

III. Duke Progress's Petition Fails on the Merits for Reasons the Commission Already Provided in This and Many Other Decisions.

If the Commission reaches the merits, it should still deny Duke Progress's petition. With lengthy and confusing arguments, Duke Progress launches yet another broadscale attack on settled precedent and the Commission's pole attachment rate reforms.[21] The arguments fare no better the third or fourth time around. The *Bureau Order* correctly finds that Duke Progress charged AT&T unjust and unreasonable pole attachment rates and must refund amounts it unlawfully collected. The Commission should deny reconsideration and ensure the competitively neutral rates that are essential to its competition and deployment objectives.

A. The JUA Rates Are Subject to Commission Oversight.

Duke Progress's first two arguments try to insulate its unjust and unreasonable JUA rates from Commission oversight, arguing that they do not qualify for review under the standards the Commission adopted in 2011 and 2018.[22] But by statute, the Commission "shall regulate" the rates Duke Progress charges AT&T to ensure that they are "just and reasonable."[23] Duke Progress's rates are not the exception.

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[21] Duke Progress in this proceeding repeats the same flawed and discredited arguments that its parent company used to unsuccessfully challenge the Commission's 2011 and 2018 ILEC rate reforms. *See* Petition for Review of Duke Energy Corporation, et al., 11th Cir. Case No. 18-14408, 9th Cir. Case No. 19-70490 (Oct. 19, 2018); Petition for Review of Duke Energy Corporation, et al., D.C. Cir. Case No. 11-1146 (May 18, 2011).

[22] *See* Petition at 1-9 (Arguments I-II). *But see Bureau Order* ¶¶ 9-14, 36-40.

[23] 47 U.S.C. § 224(b).

First, the JUA rates are subject to review under the Commission's 2018 new telecom rate presumption.[24] The presumption applies to "newly-renewed agreements," which include agreements "that are automatically renewed, *extended*, or placed in evergreen status" after the presumption's effective date.[25] The JUA fits this definition. Like the agreement subject to the presumption in the Commission's recent *Potomac Edison Order*, this JUA also states that it "shall *continue* in force" until terminated.[26] Because "'continue' and 'extend' are synonymous in this context," the new telecom rate presumption applies.[27]

Duke Progress disagrees. It takes issue with the *Bureau Order*'s reliance on the *Potomac Edison Order* to reject its argument that the new telecom rate presumption should only apply if the parties take some affirmative action to renew the JUA.[28] Duke Progress's argument lacks merit. As the *Bureau Order* explained, Duke Progress ignores the language of the JUA and "the Commission's express decision to apply [the presumption] to existing agreements that 'are *automatically* renewed, extended, or placed in evergreen status' without requiring further action by the parties."[29] The Commission has now rejected this theory in the 2018 *Third Report and*

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[24] 47 C.F.R. § 1.1413(b); *see also Bureau Order* ¶¶ 9-14.

[25] *Third Report and Order*, 33 FCC Rcd at 7770 (¶ 127 n.475) (emphasis added).

[26] *Bureau Order* ¶ 9 (quoting Compl. Ex. 1 at ATT00104 (Art. XVII.A, B); *Potomac Edison Order*, 35 FCC Rcd at 13613 (¶ 15) (agreement "shall continue in force thereafter…"); *see also Duke Florida Order* ¶ 15 (agreement "shall continue in force thereafter until partially terminated…").

[27] *Bureau Order* ¶ 9 (citing *Duke Florida Order* ¶ 15 (citing *Potomac Edison Order*, 35 FCC Rcd at 13613 (¶¶ 15-16))).

[28] *See* Petition at 9.

[29] *Bureau Order* ¶ 13 (quoting *Potomac Edison Order*, 35 FCC Rcd at 13613-14 (¶ 17) (quoting *2018 Third Report and Order*, 33 FCC Rcd at 7770 (¶ 127 & n.475))); *see also Duke Florida Order* ¶ 19.

Order, the *Potomac Edison Order*, the *Duke Florida Order*, and the *Bureau Order*. It should again be summarily dismissed.

Duke Progress also incorrectly claims that the Commission did not consider its argument that a JUA with an "evergreen provision" (like almost every JUA) should never renew for purposes of the new telecom rate presumption.[30] Duke Progress reasons that this protection of the existing pole network after termination of the JUA means the JUA never terminates for those existing attachments and argues "there can be no 'renewal' when there is no right of termination."[31] In fact, the *Bureau Order* expressly rejected this argument as well[32] because it has no support in "the text or structure of the rules or the *2018 Order*" and "run[s] contrary to the incentives for new broadband deployment that the Commission sought to foster through its adoption of that rule in the *2018 Order*."[33] The *Bureau Order* correctly found that the JUA rates are subject to review under the new telecom rate presumption.

Second, even apart from the new telecom rate presumption, the JUA rates meet the standard for review the Commission adopted in 2011.[34] In its 2011 *Pole Attachment Order*, the Commission clarified that it would review rates charged under an existing JUA if an ILEC

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[30] *See* Petition at 8.

[31] *Id.*

[32] *Bureau Order* ¶ 12.

[33] *Duke Florida Order* ¶ 18.

[34] The *Bureau Order* did not need to reach this question because the new telecom rate presumption applies. As explained in AT&T's Application for Review, the Commission did not carve complaint proceedings into different time periods subject to different standards when it adopted the presumption; it adopted the presumption without temporal limitation to simplify disputes and accelerate rate reductions. By regulation, the presumption applies to an entire "complaint proceeding[ ] challenging utility pole attachment rates" under a newly renewed JUA, 47 C.F.R. § 1.1413(b), and it should have applied to all rental periods at issue here.

"genuinely lacks the ability to terminate an existing agreement and obtain a new arrangement."[35] In case after case, the Commission has found this standard met where, as here, the unjust and unreasonable rates are locked in by an evergreen provision, the electric utility has superior bargaining power to perpetuate those rates (here, a nearly 5-to-1 pole ownership advantage), and "protracted negotiations … failed to produce a mutually agreeable, just and reasonable rate."[36]

Duke Progress does not challenge these findings in its petition, instead arguing that the JUA rates should have escaped review based on 4 additional requirements it tries to graft onto the 2011 *Pole Attachment Order*. Duke Progress first argues that unjust and unreasonable rates escape correction under the 2011 *Order* if an ILEC does not prove the "monetary value" of alleged (but disputed) competitive advantages.[37] The Commission did not adopt this standard of review. This standard would require an ILEC to both dispute the existence of an alleged competitive advantage *and* prove its (non-existent) value. Rather, the Commission has always placed the burden on the pole owner—here, Duke Progress—to justify charging a rate higher than the regulated rate,[38] as just and reasonable rates are cost-based rates designed to

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[35] *Bureau Order* ¶ 36 n.109 (quoting *Pole Attachment Order*, 26 FCC Rcd at 5335-36 (¶ 216)).

[36] *Bureau Order* ¶¶ 36-40; *see also Duke Florida Order* ¶¶ 34-38; *Potomac Edison Order*, 35 FCC Rcd at 13616-13618 (¶¶ 22-28); *FPL 2020 Order*, 35 FCC Rcd at 5326-5327 (¶¶ 11-12); *Dominion Order*, 32 FCC Rcd at 3756-3757 (¶¶ 13-14).

[37] Petition at 1-4. Duke Progress relies on an interim decision where quantification was requested based on a finding that the ILEC "concede[d] that it received and continues to receive benefits under the Agreement that are not provided to other attachers." *Id.* at 2 (quoting *Verizon Fla. v. FPL*, 30 FCC Rcd 1140, 1149 (¶ 24) (EB 2015)). That is not the case here. Duke Progress also inaccurately suggests the Commission approved a $36.02 per pole rate in that interim decision. *See* Petition at iii, 2, 6. The Enforcement Bureau did no such thing. *See Verizon Fla.*, 30 FCC Rcd at 1150-51 (¶ 25). And 3 years later, the Commission confirmed that it considered rates averaging $26.12 per pole unjust and unreasonably high. *See Third Report and Order*, 33 FCC Rcd at 7769 (¶ 125). Duke Progress charged AT&T far more that year; its 2018 JUA rate was $[redacted] per pole. *See* Compl., Ex. B at ATT00028 (Miller Aff. ¶ 8).

[38] *Bureau Order* ¶ 43 n.143; *see also Marcus Cable Assocs. v. Tex. Utils. Elec. Co.*, 18 FCC Rcd 15932, 15938-39 (¶ 13) (2003) ("Once a complainant in a pole attachment matter meets its

compensate—but not over-compensate—the pole owner.[39] The *Bureau Order*, therefore, correctly held Duke Progress to its burden to "justify 'the rate … alleged in the complaint not to be just and reasonable.'"[40] And it rightly rejected Duke Progress's effort as "speculative," "conclusory," "unsupported by reliable evidence," and "at odds with precedent."[41]

Duke Progress then argues that the JUA rates escape review and are shielded from correction because the 2000 JUA is a "historic" (or "existing") agreement whose rates are entitled to deference.[42] But the *Bureau Order* **did** treat the JUA as an "existing" agreement and found that it satisfies the "threshold" requirements for review of such agreements.[43] It also

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burden of establishing a *prima facie* case, the [utility] bears a burden to explain or defend its actions."). Duke Progress argues the JUA rates should not have been considered *prima facie* unreasonable even though AT&T's rate is far higher on a per-foot basis than Duke Progress's. *See* Petition at 3-4 (quoting Bureau Order ¶ 42). This argument fails under the 2011 *Pole Attachment Order*, which looked to the "rate per foot of occupied space" when discussing just and reasonable rates. *See* 26 FCC Rcd at 5240 (¶ 218 n.662). Duke Progress's criticism of the *Bureau Order*'s "proportionality analysis" also fails because it depends on space allegations the *Bureau Order* correctly rejected. *See* Petition at 4. *But see Bureau Order* ¶ 46 ("Duke has not shown that AT&T actually occupies more than one foot of space"). The record also refutes Duke Progress's claim that if AT&T's complaint is granted it will have "paid AT&T a per pole rate that [redacted] AT&T's entire annual pole cost" for the 2019 rental years. *See* Petition at 3 n.13. AT&T has committed to making appropriate adjustments to Duke Progress's rate for all years covered by the statute of limitations if AT&T's complaint is granted. *See, e.g.*, Reply to Answer ¶ 22, Proceeding No. 20-293 (Dec. 18, 2020).

[39] *See, e.g.*, *Pole Attachment Order*, 26 FCC Rcd at 5321 (¶ 182) ("The new telecom rate is compensatory and is designed so that utilities will not be cross-subsidizing attachers, as it ensures that utilities will recover more than the incremental cost of making attachments."); *Dominion Order*, 32 FCC Rcd at 3759 (¶ 18) (a pole owner may not recover "costs that [it] does not incur"); *Heritage Cablevision Assocs. v. Tex. Utils. Elec. Co.*, 6 FCC Rcd 7099, 7105 (¶ 29) (1991) (a pole owner may not charge a higher rate when it does not "incur[ ] any additional costs in preparing or maintaining its poles as a result of [the] installation of fiber optic cables" as compared to "coaxial cable").

[40] *Bureau Order* ¶ 43 n.143 (quoting *Dominion Order*, 32 FCC Rcd at 3759 (¶ 19 n.70) (quoting then-current 47 C.F.R. § 1.1407(a) (2018))).

[41] *Bureau Order* ¶¶ 43-46; *see also* Section III.C, below.

[42] Petition at 4-6.

[43] *Bureau Order* ¶¶ 36-40.

strictly adhered to precedent when it described the 2011 *Order*'s adoption of the old telecom rate as a "reference point" and applied that "reference point" here.[44]

Duke Progress next argues that AT&T cannot obtain relief under the 2011 *Pole Attachment Order* unless AT&T first "prove[s] either (1) that the JUA was unjust and unreasonable at the time it was executed; or (2) that [Duke Progress] subsequently wielded a growing pole ownership imbalance to its financial benefit."[45] But "there is no Commission precedent" supporting Duke Progress's argument.[46] Instead, the *Bureau Order* correctly explained that the Commission's statutory obligation is to ensure rates are just and reasonable *today* and, to that end, it decides whether JUA rates are subject to review under the 2011 *Pole Attachment Order* by looking to "whether there is an imbalance of bargaining power *today*, when AT&T is attempting to terminate the JUA and negotiate a new agreement."[47] Moreover, Duke Progress has enjoyed a growing pole ownership advantage (from a 3-to-1 advantage in 1987 to the near 5-to-1 pole advantage it has today), which it has used "to perpetuate the status quo and refuse reductions to its unjust and unreasonable rates."[48]

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[44] *See Bureau Order* ¶¶ 41, 47; *see also, e.g.*, *Duke Florida Order* ¶ 39; *Potomac Edison Order*, 35 FCC Rcd at 13607 (¶¶ 29-30); *FPL 2020 Order*, 35 FCC Rcd at 5331 (¶ 17).

[45] Petition at 7-8.

[46] *Bureau Order* ¶ 38 n.123.

[47] *Id.* (emphasis added). *See also Dominion Order*, 32 FCC Rcd at 3757 (¶ 13 n.53) ("The Commission, however, did not limit [rate relief] to situations in which a pole ownership disparity was increasing, and we reject the suggestion that such a limitation was intended given that it would deny relief to [I]LECs whose inferior bargaining positions have continuously impacted their ability to negotiate a just and reasonable rate over time.").

[48] *See Bureau Order* ¶ 39; *see also* Compl. Ex. B at ATT00027 (Miller Aff. ¶¶ 6-7); Compl. Ex. 7 at ATT00200-202 (1987 Pole Counts). Duke Progress claims a typo in the *Bureau Order*, which mistakenly substituted 1969 for the 2000 date of the JUA, became a "substantive error because the Bureau then equates the JUA rates to a vestige of the pre-competition 1970's." Petition at 8. But it was Duke Progress that argued the 2000 JUA carried forward the rate structure of "the preceding joint use agreement (executed in 1977)." *See* Answer ¶ 10. The *Bureau Order* is therefore correct that the JUA rates are a vestige of a bygone era.

Lastly, Duke Progress argues that the JUA rates escape review under the 2011 *Pole Attachment Order* in the absence of evidence of rate negotiations *before* the 2018 *Third Report and Order* took effect.[49] There is no such requirement in the Commission's orders or rules. Instead, the Commission has "declin[ed] the invitation … to modify [its] rules to preclude monetary recovery for any period prior to the time a utility receives actual notice of a disputed charge"[50] and, in 2018, retained its authority to require refunds of amounts unlawfully collected as far back as the statute of limitations allows.[51] Moreover, the only party to benefit from the timing of the negotiations is *Duke Progress*, as its "liability for refunds is limited by the applicable [3-year] statute of limitations.[52] Duke Progress does not claim it *would* have lowered its rates had AT&T asked to negotiate sooner, and the record refutes any such claim. The parties engaged in "protracted negotiations" that failed to resolve this case—not because of when they began—but because Duke Progress rejected the Commission's jurisdiction, precedent, and rate reforms during the parties' negotiations and, for that matter, throughout this dispute.[53]

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[49] Petition at 6-8.

[50] *Pole Attachment Order*, 26 FCC Rcd at 5290 (¶ 112).

[51] 47 C.F.R. § 1.1407(a).

[52] *Bureau Order* ¶ 61. Duke Progress claims that AT&T was contractually required to request negotiations sooner under Article XIII.D of the JUA, which states that "[e]ither party may make a request for review of the pricing methodology and the costs set forth in the Exhibits to this Agreement no sooner than at five (5) year intervals." *See* Petition at 6-7; *see also* Compl. Ex. 1 at ATT00102 (JUA, Art. XIII.D). The JUA rental rate formula, however, is in Article XIII.C of the JUA, so is not a "pricing methodology [or] cost[ ] set forth in the Exhibits" to the JUA. *See* Compl. Ex. 1 at ATT00102, ATT00108-110 (JUA, Art. XIII.C-D & Exs. B-D).

[53] During negotiations, Duke Progress "insisted on using inflated inputs that contradict FCC precedent," "refused to consider refunds for any prior period," and postured that "AT&T can simply remove its attachments from Duke's poles to avoid the JUA's rates." *Bureau Order* ¶ 39 & n.125 (citation omitted). The *Bureau Order* correctly rejected each of Duke Progress's flawed and tired arguments, *see id.* ¶¶ 39, 49-51, 58-63, yet Duke Progress is undeterred and continues to challenge the Commission's jurisdiction and precedent in its petition, *see, e.g.*, Petition at 9-10, 22-25.

B. Commission Regulations and Precedent Require that Rates Be Set Based on the Space Occupied on the Pole.

Duke Progress seeks to increase the rates that result from the Commission's new and old telecom rate formulas by charging AT&T for 3.33 feet of safety space on its poles that is "usable and used by the electric utility"[54] and for [redacted] feet of space allocated by a prior JUA to, but not used by, AT&T.[55] The *Bureau Order* correctly rejected these arguments because "Commission rules ... permit a utility to charge attachers *only* for the physical space occupied by their attachments."[56]

First, the Commission has "long held that the ... safety space is for the benefit of the electric utility, not communications attachers."[57] Duke Progress concedes it cannot charge AT&T's competitors for the safety space[58] and admits the *Bureau Order* reached the same conclusion based on "the Commission's previous finding that the 'safety space is usable and

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[54] *In the Matter of Amendment of Commission's Rules and Policies Governing Pole Attachments*, 16 FCC Rcd 12103, 12130 (¶ 51) (2001) ("*Consolidated Partial Order*").

[55] Petition at 9-10 (Argument III); *id.* at 21 (Argument V).

[56] *Bureau Order* ¶ 51 (incorporating *Duke Florida Order* ¶ 49) (emphasis added); *see also FPL 2020 Order*, 35 FCC Rcd at 5330 (¶ 16) ("[U]nder the Commission's rate formula, 'space occupied' means space that is 'actually occupied'"); *Consolidated Partial Order*, 16 FCC Rcd at 12143 (¶ 78) ("determination of the amount of space occupied" is based on "the amount of space actually occupied").

[57] *FPL 2020 Order*, 35 FCC Rcd at 5330 (¶ 16); *see also Bureau Order* ¶ 51 n.171 ("[T]he communications safety space is for the benefit of the electric utility, not communications attachers"); *Duke Florida Order* ¶ 49 ("We reaffirm that safety space is not attributable to communications attachers," as it "is for the benefit of the electric utility, not attachers."); *Duke Progress Order* ¶ 51 n.171 ("[T]he communications safety space is for the benefit of the electric utility, not communications attachers"); *Consolidated Partial Order*, 16 FCC Rcd at 12130 (¶ 51) ("[T]he 40-inch safety space ... is usable and used by the electric utility"); *Television Cable Serv. v. Monongahela Power Co.*, 88 FCC.2d 63, 68 (¶¶ 10-11) (1981) (rejecting argument that "the 40-inch safety space" should be added "to the 12 inches regularly allotted to [a cable attacher] to compute the space occupied").

[58] Answer ¶ 12 n.38 ("[T]he Commission has already determined that CATV and CLEC attachers should not bear this cost...").

used by the electric utility.'"[59] Yet, in the face of this established precedent, Duke Progress continues to argue that AT&T is the cause of and should be allocated that space.[60] The Commission should reject Duke Progress's plea to ignore the Commission's prior rulings. Because "AT&T's attachments do not occupy the safety space, Duke may not charge AT&T for that space."[61]

Second, the Commission's rate formulas are based on "space *occupied*," not space allocated by a JUA—or, as Duke Progress argues, by a prior joint use agreement long superseded.[62] This makes sense, as allocated space typically diverges substantially from used space,[63] and electric utilities cannot lawfully reserve extra space for ILECs.[64] Calculating rates based on physically occupied space thus ensures that attachers are charged for their actual use and avoids the potential for overcharging, undercharging, and double recovery.

Even though the "parties' previous joint use agreement *allocated* [redacted] feet of space on Duke's poles to AT&T's predecessor," AT&T's pole attachment rate must be based on the space *occupied* by AT&T.[65] Absent statistically valid survey data about the actual average space

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[59] Petition at 9 (citations omitted).

[60] Duke Progress also argues that it does not use the safety space, yet that claim is dispelled by the nature of its facilities, which require the space, and Duke Progress's use of the space for streetlights. *See* Answer Ex. A at DEP000252-253 (Freeburn Decl. ¶ 18); Answer Ex. C at DEP000297 (Burlison Decl. ¶ 9).

[61] *Bureau Order* ¶ 51; *see also Duke Florida Order* ¶ 49 & n.176 ("Duke's attempt to force AT&T to bear the cost of the safety space is, in essence, an attempt to revisit settled rulings").

[62] *See Bureau Order* ¶¶ 46, 49; *see also* 47 C.F.R. § 1.1406(d)(2) (calculating new telecom rates based on "Space Occupied"); 47 C.F.R. § 1.1409(e)(2) (2010) (calculating preexisting telecom rates based on "Space Occupied").

[63] *See, e.g.*, Compl. Ex. C at ATT00047 (Peters Aff. ¶ 24).

[64] *See In the Matter of Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, 11 FCC Rcd 15499, 16079 (¶ 1170) (1996).

[65] *Bureau Order* ¶¶ 20, 46, 49-51.

occupied, the presumption is that communications attachers occupy 1 foot of space.[66] This 1 foot presumption applies because "Duke has not provided reliable evidence rebutting th[at] presumption."[67] Duke Progress nonetheless claims it has data "showing that AT&T actually occupies at least [redacted] feet of space" on Duke Progress's poles.[68] It does not. The *Bureau Order* rejected Duke Progress's data,[69] which was fundamentally flawed, statistically invalid, and inherently unreliable.[70] The *Bureau Order* correctly applied the 1-foot space occupied presumptive input required by the Commission's rules.[71]

[66] 47 C.F.R. § 1.1410; *see also Bureau Order* ¶ 49; *Teleport Commc'ns Atlanta, Inc. v. Ga. Power Co.*, 17 FCC Rcd 19859, 19866 (¶ 18) (2002).

[67] *Bureau Order* ¶¶ 49-51.

[68] Petition at 4.

[69] *Bureau Order* ¶ 51.

[70] Duke Progress relied on measurements its contractor collected during the third-party attachment application process before make-ready potentially changed the location of attachments. It considered only [redacted] poles, which were not randomly selected, were clustered in [redacted] of [redacted] counties covered by the JUA and included multiple poles down the same pole lead. *See Bureau Order* ¶ 51 (citing AT&T Supp. Brief at 12-14, Exs. 5-6; AT&T Supp. Reply Br. at 13, Ex. 1). The data was rife with error, containing multiple entries for the same pole with vastly different measurements. And the measurements did not capture the space *occupied* by AT&T. Rather, Duke Progress paired a measurement of how far above-ground AT&T's facilities were placed with a presumption that the average (although highly fact-specific) minimum ground clearance for a utility pole is 18 feet. The resulting [redacted]-foot value is hypothetical and does not establish the space actually occupied by AT&T. *See* Reply Legal Analysis at 7-11, Proceeding No. 20-293 (Dec. 18, 2020) ("Reply Legal Analysis"); AT&T Supp. Br. at 12-15 and Exs. 5-11, Proceeding No. 20-293 (Apr. 8, 2021); AT&T Reply Supp. Br. at 12 and Ex. 1, Proceeding No. 20-293 (Apr. 19, 2021).

[71] The 1-foot space occupied presumption is consistent with all recent data the Commission has relied upon about the space occupied by ILEC facilities. *See Potomac Edison Order*, 35 FCC Rcd at 13624 (¶ 37); *FPL 2021 Order*, 36 FCC Rcd at 259 (¶ 18). Indeed, AT&T's facilities are comparable in size to its competitors' facilities, which are also presumed to occupy 1 foot of space. *See, e.g.*, Reply Legal Analysis Ex. C at ATT00399 (Peters Reply Aff. ¶ 24); Reply Legal Analysis Ex. D at ATT00418-429 (Dalton Reply Aff. ¶¶ 15-17); Reply Legal Analysis Ex. E at ATT00428-429 (Oakley Reply Aff. ¶¶ 11-12).

C. Duke Progress's Valuation Arguments Were "Speculative," "Conclusory," "Unsupported by Reliable Evidence" and "at Odds with Precedent."

Duke Progress next asks the Commission to let Duke Progress charge *more* than the "hard cap" set by the Commission's 2018 *Third Report and Order* based on valuations of alleged competitive advantages that are "speculative," "conclusory," "unsupported by reliable evidence," and "at odds with precedent."[72] The *Bureau Order* rightly rejected Duke Progress's arguments the first time around and should do so again.

First, the Commission cannot depart upward from the old telecom rate in this proceeding, because the Commission set the old telecom rate as an "upper bound" where an electric utility rebuts the new telecom rate presumption.[73] Even though the old telecom rate is "sufficiently high that it hinders important statutory objectives," the Commission found its use would create a range of rates (from new to old telecom) that is broad enough to "account for" all possible "arrangements that provide net advantages to [I]LECs relative to cable operators or telecommunications carriers."[74] And the range is certainly broad enough here, where Duke Progress could not accurately quantify the value of a single net material competitive advantage in response to AT&T's complaint.[75]

Second, the Commission correctly rejected Duke Progress's speculative valuations, which it relied on to try to embed in its pole attachment rate purely hypothetical costs it claims AT&T was able to forego because of the JUA, namely "(a) … make-ready cost[s] to replace nearly every [Duke Progress] pole to which [AT&T] is attached, or (b) [costs to] construct an

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[72] *Bureau Order* ¶¶ 43-46. *See* Petition at 11-22 (Arguments IV-V).

[73] *Third Report and Order*, 33 FCC Rcd at 7771 (¶ 129).

[74] *Pole Attachment Order*, 26 FCC Rcd at 5303 (¶ 147), 5337 (¶ 218).

[75] *See Bureau Order* ¶ 43 (rejecting Duke Progress's valuation attempts as "speculative and unsupported by reliable evidence").

entirely redundant network of poles."[76] Duke Progress's make-ready theory is based on an unfounded assumption that it installed joint use poles when it would have installed shorter non-joint use poles to meet its own electric service needs—such that, without the JUA, AT&T would have had to pay to replace each of Duke Progress's poles with a taller pole in order to attach.[77] The Commission has repeatedly rejected this argument.[78] The height of Duke Progress's poles is not a *competitive* advantage for AT&T, as AT&T *and its competitors* require Duke Progress's joint use poles and have for many decades.[79] Duke Progress "did not build its poles just to accommodate AT&T."[80]

Duke Progress misses the mark when it argues that the *Bureau Order* misreads a document Duke Progress produced, claiming it speaks only to "the replacement of poles already in joint use" so should not have been used to rebut its claim that Duke Progress would have installed shorter poles in the absence of joint use.[81] The *Bureau Order*, however, is correct about the document: it shows that, for at least half a century, it has been "electric utilities—and *not* telephone companies—that more commonly required taller poles" even in the absence of joint use.[82] When converting poles to joint use, the document states that it was [redacted]

[redacted]

[76] *Id.*

[77] *Id.*; *see also* Petition at 15-17.

[78] *See Third Report and Order*, 33 FCC Rcd at 7771 (¶ 128) (alleged competitive advantages must be "beyond basic pole attachment … rights"); *Duke Florida Order* ¶ 43; *Potomac Edison Order*, 35 FCC Rcd at 13619-20 (¶ 32); *FPL 2020 Order*, 35 FCC Rcd at 5330 (¶ 15).

[79] *See Bureau Order* ¶ 45.

[80] *Potomac Edison Order*, 35 FCC Rcd at 13619-20 (¶ 32); *FPL 2020 Order*, 35 FCC Rcd at 5330 (¶ 15).

[81] *See* Petition at 17.

[82] *Bureau Order* ¶ 45 n.151 (citing Answer Ex. 6 at 1 (DEP000180) and 15 (DEP000194)).

[redacted] while a typical nonjoint electric pole line was already "of sufficient 'strength and clearances' to allow telephone company attachments 'with little or no rearrangements or pole replacements.'"[83] And when replacing poles, the document recognizes "one of the more common reasons for premature pole replacement" was the *electric utility*'s need for additional pole space.[84] In other words, and as the Commission has repeatedly held, Duke Progress cannot rely on the height of its poles to increase the rate it charges AT&T or any other communications attacher.[85] Regardless of why it installed its poles, the Commission has already ensured that Duke Progress is fully compensated for them at a new telecom rate.[86]

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[83] *Id.* (citing Answer Ex. 6 at 1 (DEP000180)). This remains true. In a September 2020 filing, Duke Progress's parent company, joined by other electric utilities, stated that only about 0.024% of an electric utility's poles require replacement each year to accommodate an additional communications facility. *See* Initial Comments of Duke Energy Corp., et al. at 16-17, *In the Matter of Accelerating Wireline Broadband Deployment by Removing Barriers to Infrastructure Investment*, Docket 17- 84 (Sept. 2, 2020). In a January 2021 filing, Duke Progress's parent company again emphasized that its utility poles are "almost always capable of hosting an additional attachment." Ex Parte of Duke Energy Corp., et al. at 2, *In the Matter of Accelerating Wireline Broadband Deployment by Removing Barriers to Infrastructure Investment*, Docket 17-84 (Jan. 29, 2021). And in this record, Duke Progress describes a 40-foot pole as its "typical" pole *without* AT&T attached. Answer Ex. C at DEP000298 (Burlison Decl. ¶ 14). There is ample room on poles of these heights for AT&T and its competitors to attach without replacing them. Indeed, the Commission's regulations presume there is space for Duke Progress and 4 communications attachers on a 37.5-foot pole. 47 C.F.R. §§ 1.1409(c), 1.1410; *see also* Compl. Ex. C at ATT00040 (Peters Aff. ¶ 12); Reply Legal Analysis Ex. C at ATT00391-392 (Peters Reply Aff. ¶ 9); Reply Legal Analysis Ex. F at ATT00462 (Dippon Reply Aff. ¶ 51).

[84] *Bureau Order* ¶ 45 n.151 (citing Answer Ex. 6 at 15 (DEP000194)).

[85] *FPL 2020 Order*, 35 FCC Rcd at 5330 (¶ 15); *see also Bureau Order* ¶ 45; *Duke Florida Order* ¶ 43; *Potomac Edison Order*, 35 FCC Rcd at 13619 (¶ 32).

[86] 47 C.F.R. § 1.1406(d)(2) (calculating new telecom rates based on "Pole Height"); *see also Pole Attachment Order*, 26 FCC Rcd at 5299 (¶ 137) ("The [new telecom] rate is just, reasonable, and fully compensatory"); *id.* at 5321 (¶ 182) ("The new telecom rate is compensatory and is designed so that utilities will not be cross-subsidizing attachers.... The record provides no evidence indicating that there is any category or type of costs that are caused by the attacher that are not recovered through the new telecom rate."); *see also FCC v. Fla. Power Corp.*, 480 U.S. 245, 254 (1987); *City of Portland v. United States*, 969 F.3d 1020, 1053 (9th Cir. 2020); *Ala. Power Co. v. FCC*, 311 F.3d 1357, 1370-71 (11th Cir. 2002).

Duke Progress's redundant network theory is contrary to precedent as well. "The Commission has never condoned valuing an alleged advantage by assuming that, without the JUA, an [I]LEC would have built a duplicative pole network."[87] The Commission seeks to reduce rates and infrastructure costs—not overcompensate electric utilities by letting them embed in their pole attachment rates the prohibitive cost of a duplicative pole network that does not, and will never, exist.[88]

Duke Progress criticizes the Enforcement Bureau for not explaining the correct way to assign value to an evergreen provision if quantification cannot be based on the hypothetical cost of a needlessly redundant replacement network,[89] but that was not the Bureau's job. Duke Progress, not the Enforcement Bureau, has the burden to "justify" a rate higher than the new telecom rate with relevant and reliable cost valuations.[90] Duke Progress did not do so.[91]

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[87] *Bureau Order* ¶ 44; *see also id.* ¶ 45 n.152; *Duke Florida Order* ¶ 42; *FPL 2020 Order*, 35 FCC Rcd at 5330 (¶ 15) (rejecting valuation that "assum[ed] that, without the JUA, AT&T would have built a duplicate pole network").

[88] Duke Progress wants to embed in AT&T's rate an extra $[redacted] per pole every year based on this hypothetical duplicative pole network that does not exist. *See* Petition at 13. *But see Bureau Order* ¶ 39 n.131 (finding that "replicating Duke's 148,000 pole network [is] unrealistic from AT&T's perspective given the difficulty of obtaining the necessary zoning and other approvals."); *id.* ¶ 44 n.147 ("[A]s Congress has found, owing to a variety of factors, including environmental and zoning restrictions, there is "often no practical alternative except to utilize available space on existing poles.") (citation omitted).

[89] Petition at 15.

[90] *Bureau Order* ¶ 43 n.143 (quoting *Dominion Order*, 32 FCC Rcd at 3759 (¶ 19 n.70) (quoting then-current 47 C.F.R. § 1.1407(a) (2018))).

[91] In its Petition, Duke Progress repeatedly mischaracterizes its record evidence as "uncontroverted" and AT&T's evidence as nonexistent. *See, e.g.*, Petition at iii, 3, 7, 9, 10, 15-16, 19-22. Neither is true. AT&T submitted 475 pages of testimony and documentary evidence, which substantiated its claims, explained how some of Duke Progress's evidence actually supported AT&T's claims, and refuted the rest of Duke Progress's evidence and arguments. *See* Compl., Exs. A-D, 1-24 at ATT00001-344; Reply Legal Analysis, Exs. A-F at ATT00345-475.

Duke Progress also incorrectly faults the *Bureau Order* for using its expert's hypothetical valuation of an unnecessary replacement network to illustrate the bargaining leverage inherent in Duke Progress's nearly 5-to-1 pole ownership advantage.[92] Duke Progress claims it was "arbitrary and capricious" to accept the valuation for one purpose, but not another. But the *Bureau Order* did not *accept* the accuracy of the replacement cost valuation for any purpose; it simply noted that the analysis confirmed the far greater cost for AT&T to replace "148,064 Duke poles to which AT&T is attached" as compared to the cost to Duke Progress to replace "30,598 AT&T poles to which Duke is attached."[93] In other words, "AT&T's alternative to the JUA [is] far costlier," which "reinforces Duke's ability 'to perpetuate the status quo and refuse reductions to its unjust and unreasonable rates."[94]

Finally, Duke Progress improperly criticizes the *Bureau Order* for rejecting Duke Progress's conclusory claims about "tabulated" pole replacement costs and "inspection and engineering costs."[95] But the *Bureau Order* correctly rejected Duke's allegations because they were conclusory, incomplete, and incapable of validation.[96] The record established that AT&T does *not* avoid pole replacement, make-ready, permitting, or inspection costs that its competitors incur.[97] If an existing Duke Progress pole needs to be replaced to accommodate an additional communications facility, it does not matter whether the additional facility is AT&T's or AT&T's

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[92] Petition at 15.

[93] *Bureau Order* ¶ 39 & n.130;

[94] *Id.* ¶ 39.

[95] *See* Petition at 11-13, 18-19.

[96] *See Bureau Order* ¶ 46.

[97] Compl. Ex. C at ATT00041; ATT00043 (Peters Aff. ¶¶ 13, 16); Reply Ex. C at ATT00401-404 (Peters Reply Aff. ¶¶ 28-31); Reply Ex. D at ATT00413-416 (Dalton Reply Aff. ¶¶ 5-10); Reply Ex. E at ATT00426-428 (Oakely Reply Aff ¶¶ 5-9).

competitor's; the same work is required.[98] And under the JUA, AT&T incurs the cost to complete the work, or pays Duke Progress for work it asks Duke Progress to perform.[99] There are no avoided costs.

Duke Progress tries to create the illusion of value where none exists by (1) manufacturing a difference between "tabulated" and "actual" make-ready costs, (2) asking the Commission to ignore "internal costs incurred by AT&T" and focus only on "the costs that AT&T is required (or not required) to pay" to Duke Progress, and (3) claiming that it double-checks AT&T's inspections.[100] But first, there should be no difference between "tabulated" and "actual" costs because the JUA states that the "tabulated" costs reflect "the cost" to perform the relevant work.[101] Duke Progress creates an artificial difference by comparing the lowest cost pole replacement under the JUA to Duke Progress's average cost to replace poles of all heights *and* to complete all associated work.[102] Second, the Commission cannot ignore AT&T's internal costs

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[98] Reply Ex. C at ATT00392 (Peters Reply Aff. ¶ 10); Reply Ex. D at ATT00414, ATT00417-418 (Dalton Reply Aff. ¶¶ 8, 13-14); Reply Ex. E at ATT00427-428 (Oakley Reply Aff. ¶ 9)

[99] Compl. Ex. 1 at ATT00096-101 (JUA, Arts. VI-XI); Compl. Ex. C at ATT00041, ATT00043 (Peters Aff. ¶¶ 13, 16); Reply Ex. C at ATT00401-405 (Peters Reply Aff. ¶¶ 28-32); Reply Ex. D at ATT00413-416 (Dalton Reply Aff. ¶¶ 6, 9-10); Reply Ex. E at ATT00426-428 (Oakley Reply Aff. ¶¶ 5, 8).

[100] Petition at 11-12, 18.

[101] *See* Compl. Ex. 1 at ATT00096-100 (JUA, Art. VII); *see also* Reply Ex. C at ATT00406 (Peters Reply Aff. ¶¶ 33-34); Reply Ex. D at ATT00415-16 (Dalton Reply Aff. ¶¶ 9-10); Reply Ex. E at ATT00427 (Oakley Reply Aff. ¶ 8).

[102] *See* Answer Ex. A at DEP000256, DEP000260 (Freeburn Decl. ¶¶ 24-25, 35); *see also* Answer Ex. E at DEP000338 (Metcalfe Decl. ¶ 30 n.48) (stating that Duke Progress's "equipment transfer costs" are "a significant component" of its $[redacted] cost estimate); Reply Ex. C at ATT00406 (Peters Reply Aff. ¶ 33); Reply Ex. D at ATT00415-16 (Dalton Reply Aff. ¶ 10); Reply Ex. E at ATT00427 (Oakley Reply Aff. ¶ 8). Duke Progress now argues the Commission should have further investigated the cost of the associated work, but that was not the Commission's job. And, in any event, Duke Progress's argument is one-sided, ignoring the offsetting costs AT&T incurs by performing work to accommodate Duke Progress under the JUA. *See* Petition at 12. *But see, e.g.*, Compl. Ex. 1 at ATT00096 (JUA, Art. VI); Reply Legal Analysis Ex. C at ATT00404-05 (Peters Reply Aff. ¶ 32).

and Duke Progress may not lawfully "charge a higher rate" where an ILEC "performs a particular service itself and incurs costs comparable to its competitors in performing that service."[103] But as the *Bureau Order* correctly found, "AT&T completes its own make-ready, engineering, and survey work."[104] And third, this is true even if Duke Progress decides to double-check AT&T's work, as this is work Duke Progress need not perform under the JUA and does not perform because of it.[105]

The *Bureau Order* thus correctly rejected Duke Progress's valuations as "speculative," "conclusory," "unsupported by reliable evidence," and "at odds with precedent."[106] They do not justify charging AT&T an anti-competitive rate that is higher than the fully compensatory new telecom rate guaranteed AT&T's competitors.[107]

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[103] *Dominion Order*, 32 FCC Rcd at 3759 (¶ 18 & n.67); *see also* Compl. Ex. D at ATT00071 (Dippon Aff. ¶ 39).

[104] *Bureau Order* ¶ 34. Duke Progress's alleged valuation is also disconnected from the JUA and significantly inflated, as it assumes AT&T would have paid a series of uncorroborated fees at current-day values when it deployed facilities on 148,000+ poles years or decades ago. *See* Reply Legal Analysis Ex. C at ATT00403-04 (Peters Reply Aff. ¶¶ 30-31). By the time the JUA was entered in 2000, AT&T had already deployed facilities on over 125,000 Duke Progress poles. *See id.* at ATT00461 (Dippon Reply Aff. ¶ 50)

[105] *See* Compl. Ex. 1 at ATT00096, ATT00100 (JUA, Arts. VI, VIII(B)); Compl. Ex. C at ATT00041 (Peters Aff. ¶ 13); Reply Ex. C at ATT00402-404 (Peters Reply Aff. ¶¶ 29-30); Reply Ex. D at ATT00414 (Dalton Reply Aff. ¶ 7); Reply Ex. E at ATT00426-427 (Oakley Reply Aff. ¶ 6); *see also* Letter Order at 4, *Verizon Md. v. The Potomac Edison Co.*, Proceeding No. 19-355 (EB May 22, 2020) (alleged advantages must "derive from the terms and conditions of the joint use agreement"). It is not clear what uncompensated work Duke Progress claims to perform for AT&T, particularly when it admits that it does not perform "pre-construction and post-construction inspections" out of "deference" to ILECs. *See* Answer ¶ 14.

[106] *Bureau Order* ¶¶ 43-44. *See* Petition at 11-22 (Arguments IV-V).

[107] *See* Application for Review at 3-16.

D. Refunds Were Correctly Awarded Consistent with Regulation, Precedent, and the Relevant Statutes of Limitations for Contract Actions.

Duke Progress challenges settled precedent when it asks the Commission to reduce the refunds awarded by the *Bureau Order*.[108] The Commission's rules authorize refunds "as far back in time as the applicable statute of limitations allows."[109] The Commission has since confirmed that the "applicable statute of limitations" is the state limitations periods for contract actions.[110] Precedent thus resolves the applicable statute of limitations for AT&T's complaint: it is the 3-year statute of limitations for contract actions in North Carolina and South Carolina.[111]

Duke Progress seeks a different result, but precedent forecloses its arguments. *First*, Duke Progress argues that refunds should never be considered "appropriate" for periods prior to good faith notice of a dispute.[112] The Commission, however, "decline[d] the invitation … to preclude monetary recovery for any period prior to the time a utility receives actual notice of a disputed charge."[113] Doing so "runs counter to the very idea of a statute of limitations."[114] And regardless, Duke Progress was on notice beginning in 2011 that it was obligated to conform the contract rates to the just and reasonable level as required by law. It should not be rewarded for its failure and refusal to do so.

Second, Duke Progress asks the Commission to ignore the 3-year statute of limitations that applies to actions involving North Carolina and South Carolina contracts and instead apply

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[108] Petition at 22-25 (Arguments VI-VII).

[109] *Pole Attachment Order*, 26 FCC Rcd at 5290 (¶ 112); *see also* 47 C.F.R. § 1.1407(a)(3).

[110] *Potomac Edison Order*, 35 FCC Rcd at 13626-28 (¶¶ 40-46); *see also Duke Florida Order* ¶¶ 56-64; *FPL 2021 Order*, 36 FCC Rcd at 255-57 (¶¶ 9-11).

[111] *Bureau Order* ¶ 59 (citing N.C. Gen. Stat. § 1-52(a); S.C. Code Ann. § 15-3-530(1)).

[112] Petition at 22-24.

[113] *Pole Attachment Order*, 26 FCC Rcd at 5290 (¶ 112).

[114] *See id.*

the 2-year statute of limitations under 47 U.S.C. § 415(b), which bears no relation to this dispute. "Section 415(b) is a statute of limitations covering complaints against a 'carrier' for the recovery of damages" and Duke Progress "is not a carrier under the Act."[115] Duke Progress does not explain how Section 415(b) could be "applicable" to this dispute, especially when the Commission has already found it is not. Instead, Duke Progress finds the Commission's approach to refunds unfair for 2 reasons the Commission has rightly rejected.[116] Under Commission rules and precedent, "AT&T is entitled to a refund of overpayments consistent with the applicable statute of limitations, which [in this case] is three years."[117]

E. The Commission's Jurisdiction Over the Rates Duke Progress Charges AT&T Is Long Settled and Should Be Promptly Exercised.

Finally, Duke Progress challenges the Commission's jurisdiction over the pole attachment rates Duke Progress charges AT&T,[118] which was settled a decade ago and affirmed by the U.S. Courts of Appeals for the D.C. Circuit and Ninth Circuit.[119] The Commission has full authority to enforce the *Bureau Order*, deny Duke Progress's petition for reconsideration,

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[115] *See Potomac Edison Order*, 35 FCC Rcd at 13627 (¶ 45).

[116] *See* Petition at 24-25. *But see Bureau Order* ¶ 60 (incorporating analysis in *Duke Florida Order*); *Duke Florida Order* ¶ 56 n.204 (holding that "variability is inherent in the Commission's decision to adopt a state law borrowing rule in pole attachment complaint cases similar to that used in federal court"); *id.* ¶ 61 n.222 (noting that argument that a 2-year statute of limitations would apply to pole attachment complaints against ILECs is not ripe as "AT&T has not taken that position here, and we need not address [it]"). Duke Progress also speculates there may be an issue in a future case if a joint use agreement spans 2 states with different contract law statutes of limitations. Petition at 24-25. The *Bureau Order* correctly postponed consideration of this unripe issue, which is not presented here. *Bureau Order* ¶ 59 n.197 ("[W]e do not need to address a situation involving different state statutes of limitation for different poles subject to the same agreement.").

[117] *Bureau Order* § F.

[118] Petition at 25 (Argument VIII).

[119] *See Potomac Edison Order*, 35 FCC Rcd at 13612 (¶ 14 n.43); *FPL 2020 Order*, 35 FCC Rcd at 5331 (¶ 19); *see also City of Portland*, 969 F.3d at 1052-53; *Am. Elec. Power Serv. Corp. v. FCC*, 708 F.3d 183 (D.C. Cir. 2013), *cert. denied*, 134 S. Ct. 18 (2013).

and make the corrections requested in AT&T's Application for Review. It should do so promptly to ensure the just, reasonable, and competitively neutral rates needed to further the Commission's important competition and deployment goals.

IV. Conclusion

For the foregoing reasons, and those detailed in AT&T's other filings in this docket, AT&T respectfully requests that the Commission promptly deny Duke Progress's petition for reconsideration.

Respectfully submitted,

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Dated: November 1, 2021

CERTIFICATE OF SERVICE

I hereby certify that on November 1, 2021, I caused a copy of the foregoing Opposition of BellSouth Telecommunications, LLC d/b/a AT&T North Carolina and d/b/a AT&T South Carolina to Duke Progress's Petition for Reconsideration to be served on the following (service method indicated):

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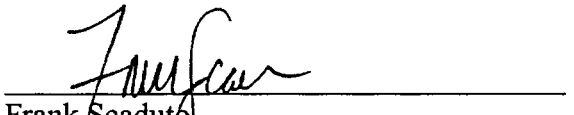

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